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9 IN THE UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 PEDRO DURAN,

15 Defendant.

16 CASE NO. 1:20-MJ-00053-SAB

17 STIPULATION REGARDING EXCLUDABLE  
18 TIME PERIODS UNDER SPEEDY TRIAL ACT;  
19 AND ORDER

20 DATE: May 14, 2020

21 TIME: 2:00 p.m.

22 COURT: Hon. Barbara A. McAuliffe

23 This case is set for a preliminary hearing on May 14, 2020. On April 17, 2020, this Court issued  
24 General Order 617, which suspends all jury trials in the Eastern District of California scheduled to  
25 commence before June 15, 2020, and allows district judges to continue all criminal matters to a date  
26 after June 1. This and previous General Orders were entered to address public health concerns related to  
27 COVID-19.

28 Although the General Orders address the district-wide health concern, the Supreme Court has  
emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive  
openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.  
*Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no  
exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at  
509; see also *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a  
judge ordering an ends-of-justice continuance must set forth explicit findings on the record "either orally

or in writing").

Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory and inexcusable—General Orders 611, 612, and 617 require specific supplementation. Ends-of-justice continuances are excludable only if “the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.” *Id.*

The General Orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics, natural disasters, or other emergencies, this Court has discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed. *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency). The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated by the statutory rules.

In light of the societal context created by the foregoing, this Court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7) (Local Code T4). If continued, this Court should designate a new date for the preliminary hearing. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be “specifically limited in time”).

## STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant's counsel of record, hereby stipulate as follows:

1. By previous order, this matter was set for preliminary hearing on May 14, 2020.
2. By this stipulation, defendant now moves to continue the preliminary hearing until **July**

1 **9, 2020, at 2:00 p.m.** and to exclude time between May 14, 2020, and July 9, 2020, under Local Code  
2 T4.

3       3. The parties agree and stipulate, and request that the Court find the following:

4           a) The government has represented that initial discovery associated with this case  
5 consisting primarily of wire communication summaries, surveillance videos, photographs, and  
6 investigative reports has been either produced directly to counsel and/or made available for  
7 inspection and copying.

8           b) Counsel for defendant desires additional time to review the discovery, consult  
9 with this client, conduct further investigation, and discuss a possible resolution with the  
10 government.

11           c) Counsel for defendant believes that failure to grant the above-requested  
12 continuance would deny him the reasonable time necessary for effective preparation, taking into  
13 account the exercise of due diligence.

14           d) The government does not object to the continuance.

15           e) In addition to the public health concerns cited by General Order 617 and  
16 presented by the evolving COVID-19 pandemic, an ends-of-justice delay is particularly apt in  
17 this case because counsel and other relevant individuals have been encouraged to telework and  
18 minimize personal contact to the greatest extent possible. It will be difficult to avoid personal  
19 contact should the preliminary hearing proceed.

20           f) Based on the above-stated findings, the ends of justice served by continuing the  
21 case as requested outweigh the interest of the public and the defendant in an indictment or trial  
22 within the original dates prescribed by the Speedy Trial Act.

23           g) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,  
24 et seq., within which an indictment must be filed and within which a trial must commence, the  
25 time period of May 14, 2020 to July 9, 2020, inclusive, is deemed excludable pursuant to 18  
26 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4] because it results from a continuance granted by  
27 the Court at defendant's request on the basis of the Court's finding that the ends of justice served  
28 by taking such action outweigh the best interest of the public and the defendant in a speedy

1 indictment/trial.

2 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the  
3 Speedy Trial Act dictate that additional time periods are excludable from the period within which an  
4 indictment must be filed and a trial must commence.

5 IT IS SO STIPULATED.

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7 Dated: May 6, 2020

McGREGOR W. SCOTT  
United States Attorney

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10 /s/ JUSTIN J. GILIO  
11 JUSTIN J. GILIO  
12 Assistant United States Attorney

13 Dated: May 6, 2020

14 /s/ ANTHONY CAPOZZI  
15 ANTHONY CAPOZZI  
16 Counsel for Defendant  
17 PEDRO DURAN

**ORDER**

18 IT IS SO ORDERED that the Preliminary Hearing is continued from May 14, 2020 to **July 9,**  
19 **2020 at 2:00 PM before Magistrate Judge Barbara A. McAuliffe.** Time is excluded pursuant to 18  
U.S.C. § 3161(h)(7)(A), B(iv).

20 IT IS SO ORDERED.

21 Dated: May 6, 2020

22 /s/ Barbara A. McAuliffe  
23 UNITED STATES MAGISTRATE JUDGE